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February 7, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 1, 2005

Case Number: TSO-0220

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. In February 2005, DOE suspended the individual's access authorization. During a background investigation, the local DOE security office had discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI resolved some of the information, but security concerns remained.

The local DOE security office issued a Notification Letter to the individual on February 3, 2005. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or Questionnaire for Sensitive National Security Positions." In the Notification Letter, DOE also explained that the individual's illegal use of drugs while holding a DOE access authorization raised concerns under the security regulations codified at 10 C.F.R. § 710.8, subsections (k) and (l) (hereinafter referred to as Criteria K and L respectively). 2/

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

2/ Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, possessed, used or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to (continued...)

In a letter to the local DOE security office, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as the Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual testified on his own behalf and elected to call his wife as a witness. The agency did not call any witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.”

II. Regulatory Standard

A. Individual’s Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer’s Decision

In access authorization cases arising under Part 710, it is my role as the Hearing Officer to issue a decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a

2/(...continued)

section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8 (k). Criterion L relates in relevant part to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; . . .” 10 C.F.R. § 710.8(l).

person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to an individual's access authorization eligibility in favor of the national security. *Id.*

III. Findings of Fact

The relevant facts in this case are uncontested. During a Personnel Security Interview (PSI) conducted on September 16, 2004, the individual admitted that he had used marijuana about four or five times per year from 1992 to approximately 2002. *See* PSI at 52, 54, 57-58 and 74. The individual also admitted that he used his wife's prescription medication, Vicodin, one or two times over the past five years. *Id.* at 70-71. The individual indicated that he was aware that his wife was purchasing marijuana for their use and was associated with the purchases by supplying funds to his wife through a monthly allowance. *Id.* at 66-68. He admits that he knew it was against DOE's policy to use illegal drugs while holding a DOE security clearance.

During the September 16, 2004 PSI, the individual also admitted that he intentionally falsified the Questionnaires for National Security Positions (QNSPs) that he signed on May 19, 2003 and June 5, 1996, when he answered "No" to questions #24a and #24b concerning illegal drug use. During his PSI, the individual stated that he falsified these QNSPs because he feared that DOE would discover that he used marijuana between 1992 and 2002. In addition, the PSI revealed that the individual intentionally lied to the OPM investigator during his 2004 background reinvestigation when he stated he had not used any illegal substances during the preceding seven years.

Although the individual readily admits to his use of marijuana during the time period from 1992 to approximately 2002, he states that he used marijuana, "a few puffs about an hour before going to bed," to help him with an ongoing sleep deprivation problem. The individual admits that this use was in poor judgment and states that once his doctor told him to quit ("because it was interfering with her [the doctor's] ability to diagnose a problem") he did so immediately. The individual further states that his doctor spoke to him about this issue three years ago and that he has not used marijuana since then. He states that he has no intentions of ever using marijuana again. In addition, the individual states that he suffers from migraine headaches for which he uses a prescription dose of Motrin. However, he indicates that on occasion the Motrin does not work and that his pain becomes excruciating. According to the individual, on these occasions (about two times in the last five years) he has taken some of his wife's prescription pain killer, Vicodin. Again, the individual admits that he knew that these actions were illegal and regrets lying about his use of illegal drugs on his QNSPs and to the OPM investigator. He has offered his assurances that he will never lie again about these issues.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors

prescribed in 10 C.F.R. § 710.7(c). ^{3/} After due deliberation, I have determined that the individual's access authorization should not be restored. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Criterion K

As stated above, the Criterion K security concerns at issue here are predicated on statements made by the individual during a PSI conducted by the DOE in September 2004. Specifically, the individual told the Personnel Security Specialist that he used marijuana four or five times a year for ten years, from 1992 to approximately 2002, and that he used his wife's prescription medication (Vicodin) one or two times over the past five years. During all of this period the individual held an access authorization. As a general matter, use of an illegal substance by an individual holding a security clearance is a source of serious concern since the ability to safeguard national security information is diminished when judgment and reliability is impaired, and individuals who use illegal substances may be susceptible to being coerced or exploited to reveal classified matters. These concerns are indeed important and have been recognized by a number of Hearing Officers in similar cases. *See, e.g., Personnel Security Hearing*, Case No. VSO-0221, 27 DOE ¶ 82,792 at 85,762 (1999); *Personnel Security Hearing*, Case No. VSO-0200, 27 DOE ¶ 82,770 at 85,628 (1998). I therefore turn to whether the individual has presented sufficient mitigating evidence to overcome the concerns of DOE Security relating to his use of marijuana and his wife's prescription medication. Based upon the record before me, I have determined that the individual has successfully carried his burden in this regard.

The Individual's Testimony

The individual testified that "during the last ten years, on rare occasions, I have smoked some marijuana, and twice during the last -- well, it's probably six or seven years now, I have taken Vicodin that is my wife's prescription, not my own." Tr. at 10. The individual explained the following:

I discovered that the . . . that a small amount of marijuana, a half an hour or so before I go to bed allows me to get 10, 11, 12 hours of sleep. I have had a serious chemical imbalance in my body that has affected me in many ways. It has especially sleep-wise. I sleep very restless, I don't get deep sleep, and over a two or three month period, it's like sleep deprivation, . . . and I would smoke a little bit of marijuana, because then I could . . . when I have a three-day weekend, so that I could get plenty

^{3/} Those factors include the following: the nature, extent, seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

of sleep over the weekend and be fresh for going back to work on Monday morning. That's my excuse, I guess.

Id. at 11.

The individual further explained that he used to suffer from serious migraine headaches for which he would typically take a prescription dose of 800 milligrams of Motrin. However, he explained that occasionally the Motrin did not help with the pain, "so when one of these [occasions] happens, where I know its going to go into a full-blown migraine, I've taken one of my wife's Vicodin she has for painkillers because of car wrecks. Here again, I was looking at it from the standpoint of it made a difference between whether I could go to work the next day or not. Wrong, I know." *Id.* at 12.

The individual testified that it has been almost four years since he has used marijuana or his wife's prescription medication to alleviate his migraine pain and remorsefully admits that he knows that his actions were wrong and represented poor judgment. *Id.* The individual testified that he is not aware of when his wife, who regularly used marijuana to control pain associated with multiple car accidents, purchases marijuana. *Id.* at 68. According to the individual, he gives his wife a monthly allowance for household items but is unaware of how and when she uses her money to acquire the marijuana. He further indicated that his wife does not smoke marijuana in his presence. *Id.* at 69. The individual also submitted into the record letters written by colleagues who have worked closely with the individual for over eight years. Both colleagues indicated that the individual is an honest, responsible and highly trustworthy person. They further found the individual to be a conscientious and dedicated employee who has never done anything to their knowledge to jeopardize national security. Individual Exhibits A and B.

During the hearing, the individual reiterated that the last time he used marijuana or his wife's prescription medication it was over four years ago in 2002. *Tr.* at 12. He stated that he has no intention to ever use marijuana or any other illegal drug again. *Id.* The individual further testified that his primary care physician has since given him his own prescription for Vicodin, although he doubts whether he will use it. *Id.* at 55.

The individual stated that he has mixed emotions about the fact that his wife uses marijuana: "I know that it could seriously harm my career. I also know what it does for her. Over the years, I've seen the difference in her physical well-being based on her use of it. Without it, she basically lays around all day long crying, screaming in pain at times." *Id.* at 63. Because of the possible repercussions of his wife's use, the individual stated that he and his wife have already discussed how she could get more powerful painkillers from her doctor in order to discontinue her use of marijuana. He stated that "we fully realize that this is necessary." *Id.* at 64.

The Wife's Testimony

The individual's wife testified that she has used marijuana for the last 30 years mostly to manage pain as a result of various injuries. ^{4/} She explained that her first injury occurred around 1983 after falling off a horse. After experiencing extreme pain in her back, she testified that she resorted to the use of marijuana to diminish her pain. The individual's wife stated that she was later involved in several car accidents which have caused her excruciating pain. *Id.* at 22. By this time, the individual's wife explained that she was taking various prescription medications as well as undergoing physical therapy. She stated the following:

I was shuttled from doctor to doctor, getting prescription after prescription. Some helped, some didn't. . . . I decided that my best bet was the Vicodin, very much helps with pain. The marijuana helped with the relaxation, being able to relieve the pain enough where I could actually sleep for three or four hours at a time. We [the individual wife and her husband] quit sleeping together at that point, because I didn't sleep. . .

Id. at 25.

The individual's wife believes that she was an "instigating factor" for her husband's use of marijuana. She corroborated the individual's testimony that he used marijuana infrequently to deal with his sleeplessness. The individual's wife testified to the following:

He used it infrequently. I was probably the instigating factor . . . I know I was the instigating factor, because of my use of it. He always worked really hard . . . long hours and had a long commute . . . I know him in some ways better than he does, because I can tell when the headaches are coming on. I could tell that he was in need of sleep . . .

Id. at 31.

Although the individual is clearly responsible for his own actions, the individual's wife admits that she encouraged the individual to use marijuana for his sleeplessness and gave him her prescription medication to help with his migraine pain. *Id.* at 33. However, she indicated that once the individual stated his desire not to smoke marijuana again, she fully supported him. The individual's wife testified that the individual has not used marijuana since he was told by his physician to quit, over four years

^{4/} The individual's wife admitted that she "did smoke some of it [marijuana] when I was in Hawaii before we [the individual and his wife] met, recreationally. Simply the culture, the age. If you haven't been to Hawaii, it's hard to understand that it's just an innate portion of the culture." *Id.* at 15. She also testified that after she met her husband, about 35 years ago, they were once at a party in Hawaii when she was smoking marijuana. The individual's wife stated that she offered the marijuana to the individual and he refused, "he was very adamantly negative about it, stating that he's a career military, he wants to go far in the Navy. . ." *Id.*

ago. When the individual's wife was asked whether she currently uses marijuana, she responded "yes," and stated that her use continues to be a sore spot in their marriage. *Id.* at 38. When asked whether her husband takes part in procuring the marijuana, the individual's wife testified that, "I have always done that. He has had no part in that whatsoever . . . it's been a sore point between us. Although he realizes that I need it for the pain . . . I do not involve him in that in any way, shape or form." *Id.* at 39. She also stated that she used her own money out of her checking account to purchase the marijuana for her needs. Although the individual's wife is given a household allowance by her husband, he doesn't ask nor does she tell him when she purchases the marijuana.

During the hearing, the individual's wife was asked about her future intentions regarding her marijuana use. She testified to the following:

I would like very much to be able to use it medically. If him [the individual] not being able to do his job . . . to get his clearance back to pursue the career that he has so diligently pursued for our entire married life. . . if my use of it were to impair that in any way, I would not use it anymore, at least until he is out from under . . . until he retires, which means I would need to have some deep, serious discussion with my primary care physician, because I would need more narcotics. I take Valium and Vicodin, and I'm on Zoloft . . .

Id. at 40.

The individual's wife stated that she is aware marijuana use is illegal in the United States and reiterated that she would be able to utilize an alternative method of pain relief in order to not place her husband's job in jeopardy. *Id.* at 41. After the hearing, the individual's wife submitted a letter stating that she quit smoking marijuana the day of the hearing and "plans on not ever smoking it again." Individual Exhibit C.

Hearing Officer Evaluation of Evidence

In evaluating the totality of the circumstances surrounding the individual's illegal drug use, I have determined that the following factors did not weigh in the individual's favor. First, the individual's willful disregard for the law by using illegal drugs is a serious matter. Second, the individual engaged in this illegal conduct over a ten-year period on at least 40 occasions while holding an access authorization. Third, the individual's conduct was both voluntary and knowing.

Against these negative factors, I weighed the following positive ones. First, through his testimony, the individual convinced me that he understands the seriousness of his past misdeeds and is taking full responsibility for his actions. The individual's current behavior demonstrates that he is now comporting himself in a responsible manner. Second, the individual convinced me that he has not used illegal drugs for over four years. The individual's wife provided persuasive testimony to corroborate the individual's testimony on this point. Third, the individual has provided credible assurances that he will not use drugs in the future. In addition, his wife has also provided credible assurances that she will discontinue her use of marijuana. In the end, the individual and his wife have provided

compelling testimonial evidence that lead me to conclude that the individual's past use of illegal drugs is unlikely to recur. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has provided sufficient compelling evidence to mitigate the Criterion K concerns at issue.

B. Criterion F

The individual's failure to respond honestly to the questions about illegal drug use on two QNSPs and to an OPM investigator raises valid and significant concerns under Criterion F. False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (affirmed by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000).

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from a pattern of lying nor self-help or self-awareness programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual's access authorization should be granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

Mitigation of Criterion F Concerns

The key issue in this case is whether the individual has presented sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. When asked why he was untruthful about his illegal drug use, the individual stated that he did not consider his limited use of marijuana and his wife's prescription medication to be significant. Tr. at 60. He testified to the following:

I knew I was going to get caught, yes. At the time, I really didn't see it as significant enough to bring up. I thought about it at the time when I signed the paperwork that maybe I ought to say something, but I wasn't sure how to go about that, so I didn't . . .

A couple of nights before [I went to the interview], my wife and I had discussed what was going to be going down. I mean, at the time I didn't have any idea he was going to ask any questions of that nature [i.e., about illegal drugs]. I thought it [the interview] was for a completely different reason, and I told her at that time that after this interview that I was going to come clean on everything. Basically, like the Vicodin, for instance, was something . . . there was absolutely no way anybody could ever find out about it, but I wanted to have a clean slate. I wanted everything to be out in the open. Unfortunately, he asked the questions before we got to the end of the interview where I could tell him everything. So I basically answered the questions at that time . . . I was waiting to voluntarily submit the information, which is what my intentions were at that interview.

Id. at 62-63.

During the hearing, the individual's wife independently corroborated the fact that the individual planned on disclosing everything concerning his illegal drug use at his PSI. *Id.* at 70-71. The individual states that during his 2004 PSI he was fully open and honest about previous illegal drug use and his past falsifications. He realizes the gravity of his dishonesty and states that he will never lie about issues of that nature again, no matter how insignificant they may seem to him at the time.

After considering all the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that the individual has not mitigated the security concern arising from the repeated deliberate omission of significant information on his QNSPs and at his interview with the OPM investigator. First, during his PSI and at the hearing, the individual stated that he understood the QNSP questions as well as the questions given by the OPM investigator, but he omitted significant information anyway in order to maintain an access authorization. The individual's willingness to conceal relevant information from the DOE in order to avoid adverse consequences is an action that is unacceptable among access authorization holders. *See Personnel Security Hearing*, 25 DOE ¶ 82,752 (1995) (affirmed by OSA, 1995). Second, the individual was given several opportunities to fully acknowledge his illegal drug use and chose not to be honest until he was questioned during his PSI. Third, the individual maintained the falsifications for extended periods, the most recent being for over a year. He completed his QNSPs in May 2003 and June 1996, and spoke to an OPM investigator in January 2004. However, he did not correct his most recent falsification until September 2004, during his PSI. Fourth, not enough time has passed since the individual's recent falsification to provide significant evidence of rehabilitation or reformation from the falsification. At the time of the hearing, it was approximately ten months since the falsification was corrected. That amount of time is not sufficient evidence of reformation from falsification, especially taking into consideration the fact that the individual did not come forward voluntarily to renounce his falsifications. *See Personnel Security Hearing*, Case No. TSO-0008, 29 DOE

¶____(2003) (individual maintained falsehoods on QNSP until confronted by personnel security specialist in PSI one year later); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification is insufficient evidence of reformation).

In summary, this is a case of deliberate falsification. The individual intended to hide the past from DOE security, and he was not forthcoming in his PSI until questioned by the personnel security specialist. Even though I believe the individual was very honest during the hearing and had planned on “coming clean” during his PSI, nonetheless, not enough time has passed since his falsifications were uncovered for me to find sufficient mitigation of the Criterion F charge. Accordingly, I find that the individual has failed to mitigate the security concerns raised by Criterion F.

C. Criterion L

As stated earlier, Criterion L relates to information indicating that an individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security. 10 C.F.R. § 710.8(l).

In the present case, the DOE reiterates the fact that the individual knew it was against DOE’s policy to use illegal drugs while holding a DOE security clearance and falsified information concerning his use. The DOE must be able to rely on persons who are granted access authorization to be honest and reliable. We have stated on numerous occasions that conduct involving questionable judgment, unreliability, untrustworthiness, lack of candor, dishonesty, or failure to obey laws and follow rules and regulations raises a concern that the individual may not safeguard classified information. Based on the foregoing, I cannot find that the individual has mitigated the Criterion L concerns at this time.

V. Conclusion

Upon consideration of the record in this case, I find that there is evidence that raised a doubt regarding the individual’s eligibility for an access authorization under Criteria K, F and L. While I find that the Criterion K security concerns have been sufficiently mitigated, I find insufficient evidence in the record to resolve the security concerns raised by the Criteria F and L derogatory information.

Therefore, I cannot conclude that restoring the individual’s access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the individual’s access authorization should not be

restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth in 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: February 7, 2006